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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

No. 810.

FRANK J. BOEHM,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION OF FRANK J. BOEHM FOR A REHEARING.

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PETITION FOR REHEARING.

To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court:

Comes now the above-named petitioner, Frank J. Boehm, and presents this, his petition for a rehearing in the above-entitled cause and, in support thereof, respectfully shows:

The opinion of the court below held that the trial court was in error in failing to compel production of transcripts of prior testimony given by various witnesses for the Government before representatives of the Securities and Exchange Commission, which, in most instances, was admitted by the witnesses to have been contrary to the testimony given at the trial, and that they had changed their

testimony after having been granted immunity (George K. Miltenberger, R. 568, 569; Eugene K. Kropp, R. 758; L. H. Keller, R. 354; Harry Williamson, R. 467, 907, 908; Rex H. Fowler, R. 398, 399; B. P. Alschuler, R. 386-391). One witness, while admitting the testimony was contradictory, denied any grant of immunity (E. B. Hamilton, R. 491). Another admitted a grant of immunity, but denied any prior contradictory testimony (Herman Spoehrer, R. 635, 638).

The opinion recognized that defendant's right to these transcripts of prior testimony was incident to his right to a fair trial. It was, however, held that this error was not prejudicial, because the appellant (petitioner) had not shown that his substantial rights were prejudiced, and that he had not shown that these transcripts contained any matter which was competent, relevant or material in the defense of his case, despite the fact that refusal by the court to order production of the transcripts made it impossible for him so to do. The court's opinion, as was pointed out in petitioner's Brief in support of his petition for writ of certiorari (p. 27), stated (R. 1263):

> "The contention that appellant would have thrown some light on the issues more favorable to himself if he had had the transcripts is entirely speculative. The evidence affords no ground for any such belief and there is no statement of fact throughout the briefs to justify an inference that such belief really exists."

And (R. 1266):

> "But in this case, where it is apparent that no essential ingredient of the offense was in any way dependent upon any matter contained in the transcripts, and there is no reason to believe that any matter contained therein was competent, relevant or material matter of defense 'to order a new trial would be to violate the standards of Section 269 of the Judicial Code (U. S. C., Sec. 391), since the substantial rights of the defendant were not affected.'"

Thus there was placed upon petitioner the burden of showing prejudicial error and the Court relied upon, as authority for this conclusion, Section 269 of the Judicial Code as amended February 26, 1919 (28 U. S. C. A., Sec. 391).

The rule has always been that in jury trials errors are presumptively injurious or prejudicial, unless it affirmatively appears from the whole record that they were harmless. The enactment of the amendment to Section 269 of the Judicial Code in 1919 did not change this rule. This Court so stated in United States v. River Rouge Co., 269 U. S. 411, 421, 70 L. Ed. 339, 346, 46 S. Ct. 144, and expressly so held in Williams v. Great Southern Lumber Co., 277 U. S. 19, 26, 72 L. Ed. 761, 767, 48 S. Ct. 417 (1928); and again in McCandless v. United States, 298 U. S. 342, 347, 80 L. Ed. 1205, 1209. These cases, and the conflict of the opinion below therewith, were set forth in the petition for certiorari (p. 16) and in the brief in support thereof (pp. 27, 28).

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in this case, in misconstruing Section 269 of the Judicial Code as amended, and in placing a construction thereon directly contrary to that of this Court, has again fallen into the same error which it consistently, with one exception, has enunciated since the amendment of that Section in 1919. The first of these cases is Rich v. United States, 271 Fed. 566, 569 (8th Circuit, 1921), in which the Court adopted as its understanding of the meaning of Section 269 as amended, an interpretation of that section by the seventh circuit in the case of Haywood v. United States, 268 Fed. 795, holding that this statute changed the rule and placed the burden of showing prejudicial error upon the complaining party.

The next case involving this section by this same court is that of Trope v. United States, 276 Fed. 348, 351 (8th Circuit, 1921), it being there stated:

> "Since the amendment of Section 269 of the Judicial Code (Comp. St. Ann. Supp. 1919, Sec. 1246) the burden is on the plaintiff in error to show from the whole record that some substantial right has been denied to him."

Thereafter the court held to like effect in Furlong v. United States, 10 Fed. (2d) 492, 495 (8th Circuit, 1926); Miller v. United States, 21 Fed. (2d) 32, 36 (8th Circuit, 1927); Salerno v. United States, 61 Fed. (2d) 419, 424 (8th Circuit, 1932); Goldstein v. United States, 63 Fed. (2d) 609, 614 (8th Circuit, 1933); Mansfield v. United States, 76 Fed. (2d) 224, 232 (8th Circuit, 1935), and Morgan v. United States, 98 Fed. (2d) 473, 477 (8th Circuit, 1938). Despite the fact that this Court held directly to the contrary in January, 1926, in United States v. River Rouge Co., supra, it was not until April, 1941, that the eighth circuit recognized that its construction of this section was in conflict with that of this Court. That was in the case of Fort Dodge Hotel Co. v. Bartelt, 119 Fed. (2d) 253, 259, which was a civil case, and the opinion was written by Judge Sanborn, who did not sit in this case below.

We respectfully direct these decisions to the Court's attention to demonstrate that our construction of the opinion of the Circuit Court of Appeals for the Eighth Circuit is not a misinterpretation of this decision, but shows that it is entirely consonant with the construction which that court placed on that section up until twenty-two years after its passage. We reiterate the contention made in the petition for certiorari and brief in support thereof, that the opinion of the court below placed on petitioner the burden of showing that the admitted error was prejudicial, in that it was held, that he made no showing that the transcripts of prior testimony, the right of access to which was denied him, contained relevant, competent or material evidence, which, of course, under these circumstances was

impossible for him to meet, and that in so holding the opinion is in direct conflict with the opinions of this Court in McCandless v. United States, Williams v. Great Southern Lumber Co. and United States v. River Rouge Company, supra.

The Government filed a brief in opposition to the petition for certiorari in this case, the sole theme of which was that the evidence of guilt was so great that there was little room for reasonable doubt, and that failure to convict on the part of the jury would have been a miscarriage of justice. Such an argument not alone is not pertinent to the legal questions presented to this Court on a petition for writ of certiorari, but overlooks the fact that every person accused of crime is, in the prosecution of that accusation, presumed to be innocent, and under the Constitution of this country he is, in the process of the proof of his guilt, entitled to a fair trial, and it is only after his conviction in a fair trial that it can be said he has been accorded his constitutional rights. In the case of Fina v. United States, 46 Fed. (2d) 643 (10th Circuit), the Government filed a brief of similar tenor, and the statement of the Circuit Court of Appeals for the Tenth Circuit with reference to that brief is worthy of note. The court there said (l. c. 645):

> "However, the brief in this case was being prepared, addressed and to be presented to a court of justice to aid that court in the doing of justice to one accused of the commission of a crime—a felony. Hence, in all reason and good conscience, he, and all officers of our courts of justice, should be mindful of the fact that we are now living in a period of our country's life when crime is rampant, a time in which there is a rapidly growing outcry against crime by all good citizens; a time in which there is an ever-increasing insistence upon the part of the public when a crime is discovered to have been perpetrated to cry

> out, as of old, 'Give us a sacrifice to wipe out this blood.' At such a time it is entirely too dangerous to individual liberty, too dangerous to the safety of the citizen, which is or should be the supreme concern of government, to ignore or to attempt to strike down our constitutional safeguards. Indeed, today, more than ever before in our country, our constitutional guaranties, achieved at so much sacrifice of blood and suffering, and written by the strong hands of noble men, become of transcendent importance, guaranteeing, as they do, to the innocent, protection, to the guilty a fair and impartial trial."

Petitioner did not have a fair trial. Denial to him of access to the transcripts of the prior testimony of the principal government witnesses for the purposes of impeachment, to which he was entitled incident to his right to a fair trial, was error. The opinion of the Circuit Court of Appeals so holds. Its further conclusion, that this error was harmless because petitioner made no affirmative showing that it was prejudicial to him, is in direct conflict with the decisions of this court as set forth in the petition for certiorari and again hereinabove. Furthermore, when it is considered that a jury of twelve men were, after twenty-six hours of deliberation, unable to agree, and it required a supplemental instruction of the character given in this case to obtain a conviction, the conclusion seems inescapable that it was prejudicial error.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that upon further consideration the petition for a writ of certiorari be granted.

Respectfully submitted,

JOHN S. LEAHY,
Counsel for Petitioner.

Certificate of Counsel.

I, John S. Leahy, counsel for the above-named petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

John S. Leahy,
Counsel for Petitioner.